

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:07-CR-121-F
No. 7:09-CV-166-F

CLYDE EDWARD LOVE,)	
Movant,)	
)	
v.)	<u>O R D E R</u>
)	
UNITED STATES OF AMERICA)	
Respondent.)	

This matter is before the court for initial consideration of Clyde Edward Love's ("Love") "Motion to Vacate, Set Aside or Correct his Sentence" pursuant to 28 U.S.C. § 2255 [DE-90], and his Motion to Amend [DE-95], adding claims. Rule 4, RULES GOVERNING § 2255 PROCEEDINGS, provides:

(b) Initial consideration by judge. . . . If it plainly appears from the motion, any annexed exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.

On October 6, 2009, Love was sentenced to serve 60 days active custody upon his conviction of simple assault in violation of 18 U.S.C. § 113(a)(4). The jury found him not guilty of assault with a dangerous weapon. The record reflects that Love's sentence and conviction on Count Two currently is on appeal.

Love's § 2255 motion [DE-95] is premature in light of his pending appeal. *See Walker v. Connor*, 72 Fed. Appx. 3, 4 (4th Cir. 2003) (recognizing that § 2255 motion is premature when a direct criminal appeal is pending); *and* Rules Governing § 2255 Proceedings,

Rule 5 advisory committee note (stating the orderly administration of criminal law precludes considering a § 2255 motion while appeal is pending absent extraordinary circumstances).

Accordingly, it is ORDERED:

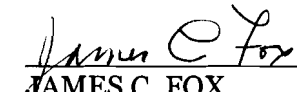
1. Love's § 2255 motion [DE-90] is DISMISSED *without prejudice*;

2. Love's Motion to Amend [DE-95] is DENIED *without prejudice*; and

3. Pursuant to Rule 11(a), the Rules Governing § 2255 Cases, the court declines to issue a certificate of appealability as Love has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong).

SO ORDERED.

This, the 1st day of November, 2010.



JAMES C. FOX
Senior United States District Judge